that in their case, the appellants' unconditional appearances were fatal to their right to object to jurisdiction. To my mind, the same ruling would apply in this case.

It was also my finding that, in the light of the wording in O. 2 rule 2(1) of the Rules and decided authorities, any application to set aside any proceedings for irregularity under that rule, or for being frivolous, vexatious and an abuse of the process of Court under 0.18 r. 19 of the Rules, has to be made within a reasonable time and my view was that five years in this case, especially so when the hearing date had already been fixed and several other applications had been made before that, was certainly not a reasonable time. On this ground alone, the third prayer must also fail.

All factors considered, I could only come to the conclusion that the defendant's application ought to be dismissed with costs which I so ordered.

EDMUND LAU YICK MAN

v.

PUBLIC PROSECUTOR

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CRIMINAL APPEAL NO. KG. 47 OF 1991]
11 DECEMBER 1992

CRIMINAL LAW: Charge under s. 471 Penal Code - Accused found guilty and sentenced Appeal against conviction and sentence - Whether conviction sustainable - Whether sentence unreasonable and manifestly excessive.

The appellant was charged with the offence of dishonestly using as genuine a document, for the purposes of securing overdraft facilities from a bank, which document he knew at the time of using it to be a forged document.

After hearing the case for the prosecution and the defence the learned Magistrate found the appellant guilty of the offence charged and sentenced him to 12 months imprisonment and a fine of RM5,000..

The appellant appealed against both his conviction and sentence.

Held:

[1] There were no grounds for reversing the learned Magistrate's conviction of the Accused. The learned Magistrate was not shown to be wrong in rejecting the evidence of the appellant and accepting as the truth the evidence of the prosecution witnesses which clearly established the case of the prosecution beyond all reasonable doubt.

[2] The appellant was a first offender and a man with a high educational background whose career would be affected by the mere fact of conviction. No one had suffered financial loss from the acts of the appellant. Sentence of imprisonment was unreasonable and excessive and is set aside. The sentence of fine affirmed.

[Appeal against conviction dismissed. Appeal against sentence allowed in part].

Casesreferred to:

Cheong Khean Sheng v. PP [1970]2 MLJ 175 (refd)
Ooi Teik Chin v. PP [1971] 1 MLJ51 ***(refd)***
PP v. Mohamad Fathi bin Haji Ahmad[1979]2MLJ 75 ***(refd)***
Winter v. Boynton (Times 6/2/1991 CA) (refd)

Legislation referred to:
Criminal Procedure Code, s. 173A
Penal Code, ss. 465, 471

For *the appellant - Unrepresented*
For the respondent - Thomas Akin, DPP

JUDGMENT

Chong Siew Fai J:
In the Magistrates' Court at Kuching the Accused was charged with the offence of dishonestly using as genuine a document, namely a "legal practising certificate No. 0439" purported to have been issued by the Registrar, High Court, Kuching and dated 14 March 1987 for the purpose of securing overdraft facilities from the Development & Commercial Bank Bhd. (the bank)., which document he knew at the time of using it to be a forged document, an offence punishable under s. 471 of the Penal Code read with s. 465 thereof.

The Accused claimed trial at the conclusion of which he was found guilty of the offence charged and sentenced to 12 months' imprisonment and fine of RM5,000 in default 6 months' imprisonment.

The imprisonment sentence was stayed pending appeal but the fine was paid.

Against the conviction and the sentence the Accused appeals.

The evidence adduced by the prosecution may be briefly summarised as follows:

PW3 Niru anak Anton, a credit officer of the bank testified that on 24 July 1987 the Accused approached him for the grant of credit facilities to the extent of RM40,000. He said amongst the documents the Accused directly handed to him was a photostat copy of Legal Practice Certificate No. 0439 (Exh. P3) bearing the name of "Edmond Lau Yickman". According to Mr. Niru, the Accused told him that he (the Accused) wanted to set up a legal practice. On the same day, Niru discovered from the Registrar of the High Court that the legal practicing certificate was a forged document. The loan was never approved.

PW4 Agnes Wong, Registrar of the High Court in Borneo at the material time, who issued practising certificates to advocates practising in Sarawak, testified that upon being inquired by the officer of the bank as to whether the Accused was on the Roll of Advocates, she investigated and found that the Accused had not been called to the Bar, that no Practising Certificate and had been issued to him and that the Certificate No. 0439 dated 14 March 1986 (Exh. P5) was issued to Leopold Si Poh Heng (PW2). In answer to the Court, Madam Wong said that upon comparison and through checking she found that the Certificate No. 0439 had been forged. She accordingly lodged a report with the police (Exh. P6).

PW1 Idris bin Abdullah and PW2 Sunny Si Poh Heng were in 1986 practising advocates in Kuching. They were then in the same legal firm, Idris & Co. Their evidence established that the Accused frequented their office in 1986 where Mr. Si kept his Practising Certificate. In about June or July 1986, he also allowed the Accused to have access to his file as the Accused was seeking advice for call to the Bar.

At the close of the case for the prosecution, the learned trial Magistrate ruled that the prosecution had made out *a prima facie* case against the Accused which, if unrebutted, would warrant his conviction. He accordingly called upon the Accused to enter upon his defence.

However, he went on to acquit the Accused "on the other charge under s. 465 Penal Code" holding that there was no evidence that the Accused had made or even signed the false document. With respect, the learned trial Magistrate had clearly laboured under a misconception. The Accused was not charged with forging the documents. Therefore, no question of acquittal under that section arose.

The learned trial Magistrate then went on to amend the last part of the charge to read:

> ... and you thereby committed an offence under s. 471 and punishable under s. 465 Penal Code.

With respect, s. 471 of the Penal Code also provides mode of punishment by reference to s. 465 of the said Code. The relevant part of s. 471 reads:

> ... shall be punished in the same manner as if he had forged such document.

Hence, one of the ways of giving particulars relating to punishment in the charge would be by stating that the offence is punishable under s. 471 read with s. 465 of the Penal Code.

However, I do not think the errors above mentioned have in any way occasioned a miscarriage of justice.

The evidence of the Accused shows that he obtained his Bachelor of Laws degree from the King's College London. He, however, admitted he had not been called to the Sarawak Bar and had no practicing certificate.

He admitted applying for overdraft facilities from the bank but he said the facilities were for the credit company he ran. He denied ever seeing Mr. Niru. He also denied giving the forged certificate (Exh. P3) to the latter and making use of it. He said he saw only one Peter Salang (the manager) and one Peter Siow about the facilities.

He admitted having been to Idris' chambers but "once a while". He said he obtained from Mr. Idris a loan which he did not repay. As a result, Mr. Idris through one Osman, threatened to give him (the Accused) trouble. Mr. Idris on the other hand, denied issuinga threat. He said it was an error on his part to give the loan and that although he had asked for repayment on 4 occasions, he no longer pursued the matter.

In his judgment the learned trial Magistrate was satisfied that the prosecution had proved its case beyond reasonable doubt and that the defence had not created any doubt in the prosecution case. He found Mr. Niru and the Registrar Madam Wong to be witnesses of truth and believed their evidence. He accordingly found the Accused guilty of the offence charged and meted out the sentence.

At the appeal before me, the Accused (appellant) did not allude to any of the 3 grounds of appeal prepared by his erstwhile Counsel beyond denying commission of the offence and maintaining his innocence. Nevertheless I would briefly deal with them.

Ground (a) of Appeal reads:

> The learned trial Magistrate erred in law and in fact in holding against the weight of the Defence evidence that the Defence has failed to create doubt in the prosecution's case.

A contention that "the finding is against the weight of evidence" is not a sufficient ground of appeal. *Ooi Teik Chin v. PP* [1971] 1 MLJ 51. This is particularly true in a case like the present one where the assessment of and the weight to be attached to the evidence are relatively an easy task as the evidence and the facts are brief and simple. I am not persuaded that the learned trial Magistrate had erred in holding that the defence has failed to create doubt in the prosecution case.

I would next deal with Ground (c) of Appeal which reads:

> The learned trial Magistrate erred in law and in fact in holding that PW3 and the Registrar are the witnesses of truth in the sense of not lying in Court.

The question of which witness or witnesses to believe is essentially a matter for the trial Court which has the advantage of seeing the witnesses giving evidence and observing their demeanour. In any ground for appeal which depends on challenging the trial Court's finding based on the credibility of witnesses, the appellant has to show and convince the appellate Court that the trial Court had been plainly wrong. It is not enough to simply show that there are doubts on the matter. *Winter v. Boynton* Times 6 February 1991 CA. In our present case the learned trial Magistrate was justified in accepting PW3 and PW4 as witnesses of truth and the appellant has failed to show how he was wrong.

The last ground alleges that the learned trial Magistrate had "erred in law in holding that the Prosecution has proved its case beyond any reasonable doubt whatsoever." Here again I find no merits in the contention. The learned trial Magistrate had clearly rejected the evidence of the Accused and accepted as the truth the evidence of the prosecution witnesses which clearly established the case of the prosecution beyond all reasonable doubt.

The contention of the appellant before me that he was innocent is therefore rejected.

The appeal against conviction is dismissed.

As regards the sentence imposed, the law enacts that the offence is punishable with imprisonment of up to 2 years or a fine or both. The appellant contended that the punishment of imprisonment and a fine is too harsh. The prosecution urged that the sentence be not disturbed, citing *Cheong Khean Sheng v. PP* [1970] 2 MLJ 175 in which the Magistrates' Court gave an imprisonment sentence of 6 months for the dishonest use as genuine a

Singapore identity card in order to exchange it for a Federation identity card. However, that case was only concerned with the appeal against conviction. Each case depends essentially on its particular facts. In *PP v. Mohamad Fathi bin Haji Ahmad* [1979] 2 MLJ 75, for example, the appellate Court, in quashing a binding over order made under s. 173A of the Criminal Procedure Code, fined the offender RM10,000 in default 2 years' imprisonment. In my opinion, decisions on sentence in particular cases cannot be regarded as binding precedents (except on technical matters), though they maybe cited as examples of how a particular type of case had been dealt with in the past and may be useful as an aid to achieve uniformity of sentence for cases bearing apparent similarities without being authoritative in the strict sense.

In the instant case, it is indeed rather naive to think that the criminal act as in the present case and in a relatively close society like Kuching would not be easily detected. The loan, however, had not been approved. No one had suffered any financial loss. The Accused was a first offender and is a man with a high education background whose career would be affected by even the mere fact of a conviction. In the circumstances, the sentences of imprisonment for 12 months and a fine of RM5,000 is, in my opinion, unreasonable and manifestly excessive. A fine, I think, would be adequate punishment. The sentence of imprisonment is set aside. The fine of RM5,000 is affirmed. To that extent the appeal against the sentence is allowed.

LAI SOON CHEONG

v.

KIEN LOONG HOUSING DEVELOPMENT SDN. BHD. & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. F 323 OF 1984]
11 SEPTEMBER 1992

LAND LAW: Sale and purchase of shophouse - Developer creating further encumbrance without approval of purchaser • Whether charges bank knew of previous charge - Priority of charges - Defeasibility of title - Allegation of fraud.

The plaintiff agreed to purchase a shophouse from the 1st defendant, who were developers. It was a condition of the sale and purchase agreement that the 1st defendant should not create further encumbrances other than those already subsisting as at the date of sale and purchase without the approval of the plaintiff. The 1st defendant without the knowledge and approval of the plaintiff created a third party charge, over the lots where the plaintiffs shophouse was to be built, in favour of the 2nd defendant. The charge was registered on 11 February 1992.

The development of the property was abandoned and as the 1st defendant failed to make payments, the 2nd defendant instituted proceedings. The plaintiff lodged a caveat on the said property on 31 May 1992.

Held:

[1] There is no doubt in the circumstances of the present case the that plaintiff has acquired only a right *in personam* to the said property against the 1st defendant, as vendor personally particularly since he has indicated in his pleading as well as in his evidence, that he is ready and willing to pay the balance of the purchase price thereby fulfilling his obligations under the said agreement. But his right *in personam* is not good against the 2nd defendant. On the other hand the 2nd defendant has acquired a right *in rent* to the said property under the charge which had been duly registered. Their right is a real right good against the world as a whole.